

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

IN RE COMPACT DISC MINIMUM]	
ADVERTISED PRICE ANTITRUST]	MDL DOCKET No. 1361
LITIGATION]	

MEMORANDUM DECISION AND ORDER ON MOTION TO DISQUALIFY

On May 18, 2000, the law firm of Milberg Weiss Bershad Hynes & Lerach (“Milberg Weiss”) filed suit on behalf of consumers against certain named music compact disc distributors and retailers, accusing them and unnamed co-conspirators of price fixing. Until May 18, 2000, and perhaps for a brief time thereafter, Milberg Weiss also represented certain retailers in a lawsuit accusing the music CD distributors of price fixing. The question on this motion to disqualify is whether that representation of certain retailers created a conflict of interest that prevents Milberg Weiss from proceeding as counsel in this putative class action on behalf of consumers. I conclude that it does.

FACTS¹

On December 1, 1997, Milberg Weiss, representing Third Street Jazz and Rock Holding Corporation, filed a class action complaint on behalf of CD retailers against CD distributors, alleging that the distributors were engaged in a horizontal price fixing scheme of CD prices. See Complaint of Third Street Jazz & Rock

¹ To the extent the facts are not based upon docket entries and pleadings, I take them from the report of Milberg Weiss’s expert, Professor Roy Simon, a Professor of Law at Hofstra University School of Law. Milberg Weiss retained Professor Simon to advise the firm whether representing the retailers disqualified it from representing the consumers in the present action. Professor Simon determined that it did not and prepared a report (the “Simon Report”) describing his findings on *(continued next page)*

Holding Corp. v. EMI Music Distrib., No. 97-8864 (C.D. Cal. 1997). The Multi-District Litigation Panel transferred a number of similar suits to the Central District of California. See In re Compact Disc Antitrust Litig., MDL No. 1216 (C.D. Cal. 1997). Milberg Weiss was not appointed lead counsel in that consolidated litigation, but did assist in preparing plaintiffs' depositions, briefing motions, reviewing documents and otherwise prosecuting the action. In addition, an associate at Milberg Weiss represented three other retailers² in the consolidated California action, preparing discovery responses on their behalf and representing these entities at depositions. Simon Report at 2. Ultimately, the California court denied the retailers' motion for class certification, but the lawsuit is still pending.

On May 18, 2000, Milberg Weiss notified co-counsel in the Third Street Jazz case that it was withdrawing from the case.³ On the same day, Milberg Weiss filed class action complaints on behalf of consumers accusing CD distributors and unnamed retailers of violating antitrust laws through the use of minimum advertised pricing policies. See Michaelson v. Capitol Records, Inc., No. 00-05398 (C.D. Cal. May 18, 2000); Noll v. BMG Music, No. 00-2852 (E.D.N.Y. May 18, 2000); Schwam v. BMG Music, No. 00-2851 (E.D.N.Y. May 18, 2000). Other law firms filed consumer class actions making similar allegations and naming certain retailers (not the four Milberg Weiss clients) as defendants. See In re Compact Disc Minimum

Milberg Weiss's alleged conflict of interest.

² The three clients were Chandu Dani (d/b/a Compact Disc Warehouse), Digital Distribution, Inc. and Record Revolution, Inc. See Simon Report at 2.

³ On June 1, 2000, Milberg Weiss filed a voluntary dismissal of the Third Street Jazz lawsuit. See No. 97-8864, Docket Item 30. On June 5, 2000, the firm of Kaplan, Kilsheimer & Fox, co-lead counsel in the retailer action, informed Milberg Weiss that Milberg Weiss might be engaging in a *(continued next page)*

Advertised Price Antitrust Litig., MDL No. 1361, Joint Mot. Of Distrib. Defs. To Transfer & Consol. For Pretrial Proceedings (July 25, 2000). All of these lawsuits and similar State Attorney General lawsuits have been transferred to this Court for pretrial proceedings and have been consolidated for pretrial discovery before this Court. See In re Compact Disc Minimum Advertised Price Antitrust Litig., MDL No. 1361 (D. Me. Nov. 1, 2000) (order on practice and procedure). Apparently in response to Milberg Weiss's seeking lead counsel status in the consolidated proceedings, two other law firms—Polack, Rosenberg, Endom & Riess and Krislov & Associates—representing four individual plaintiffs, moved to disqualify Milberg Weiss. Milberg Weiss has opposed the motion. The motion has been submitted on facts that are essentially undisputed. Three legal ethics professors have also given their opinions.

ANALYSIS

1. Applicable Law

Under the Local Rules of this Court, Maine's rules of professional ethics—the Maine Bar Rules—govern.⁴ Aware that law firms with a national practice have voiced some concern over varying ethical rules from jurisdiction to jurisdiction, see Discussion Draft of Federal Rules of Attorney Conduct, in Judith McMorow, The (F)Utility of Rules: Regulating Attorney Conduct in Fed. Court Practice, SF13 A.L.I.-A.B.A. 317, 327 (Nov. 2000), I hasten to add that the result I reach here would

conflict of interest as counsel in the consumer actions. See Simon Report at 2-3.

⁴ The District of Maine Local Rule 83.3 states that "[t]he Code of Professional Responsibility adopted by this Court is the Code of Professional Responsibility adopted by the Supreme Judicial Court of Maine, as amended from time to time by that Court." ME. LOCAL RULES 83.3. Therefore, the
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be the same under most if not all ethical standards,⁵ and is not simply an artifact of the MDL Panel's decision to transfer pretrial proceedings in these cases to Maine.

2. Standing of the Moving Parties

Milberg Weiss does not challenge the standing of the four private consumer plaintiffs, through their attorneys, to assert the motion to disqualify. I therefore address that subject only briefly. Although motions to disqualify a lawyer are generally brought on behalf of former or current clients, standing to assert conflicts of interest is not limited to such clients. In fact, the First Circuit has allowed opposing counsel to bring a motion to disqualify, extending standing to those who are placed at a disadvantage by reason of a lawyer's breach of an ethical duty. See Kevlik v. Goldstein, 724 F.2d 844, 847 (1st Cir. 1984) (holding that opposing counsel has standing to assert motion to disqualify because lawyers must report ethical violations). For purposes of the dispute here—a law firm seeking to represent a class of private consumers—I consider other putative class members, such as the four consumers bringing the motion to disqualify, to be the equivalent of clients of the Milberg Weiss law firm.⁶ Therefore, given that they are members

conflict rules of the Maine Code of Professional Responsibility will apply.

⁵ I have also consulted the ABA Model Rules of Professional Conduct Rule 1.9 (if the interests are materially adverse representation is forbidden unless the former client consents), the Restatement (Third) of the Law Governing Lawyers § 133 (if the interest is materially adverse, consent of both former and current clients is required), and the California Rules of Professional Conduct of the State Bar of California Rule 3-310(E) (new representation is forbidden if the lawyer obtained material confidential information from the other client unless there is informed written consent by that client).

⁶ I recognize that great care must be exercised in applying ethical rules to class actions. Herbert B. Newberg & Alba Conte, Newberg on Class Actions, § 15.01 (3d ed. 1992); Herbert B. Newberg, Special Conflicts of Interest Rules Apply in Class Actions, 10 *Verdicts, Settlements & Tactics* 149 (1990). For example, in a settlement of a class action, certain individual members of the
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of the putative consumer class and that Milberg Weiss seeks to participate in the class action as class counsel, the four private consumer plaintiffs have standing to assert the motion to disqualify.⁷

3. The Conflict of Interest

Under the Maine Code of Professional Responsibility, a lawyer may not represent a client if the representation would involve a conflict of interest. Me. Bar Rule 3.4(b). According to the Maine Rules, “[r]epresentation would involve a conflict of interest if there is a substantial risk that the lawyer’s representation of one client would be materially and adversely affected by the lawyer’s duties to another current client, [or] to a former client. . . .” See ME. BAR RULE 3.4(b)(1). In determining whether such a conflict exists, “a district court is vested with broad power and responsibility to supervise the professional conduct of the attorneys appearing before it.” Fiandaca v. Cunningham, 827 F.2d 825, 829 (1st Cir. 1987) (citing Kevlik v. Goldstein, 724 F.2d 844 (1st Cir.1984)).

The Maine rules have a specific provision when the interests of a former client may be involved. See ME. BAR RULE 3.4(d). They state: “Except as permitted by this rule, a lawyer shall not commence representation adverse to a former client

class may oppose the terms of settlement, but this cannot mean that class action counsel is therefore automatically disqualified. See Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 589 (3d Cir. 1999).

⁷ I also recognize that the law firm initially bringing the motion was simultaneously seeking to be appointed lead counsel in competition with the Milberg Weiss request to be lead counsel. See Mot. to Disqualify, Dec. 8, 2000; Polack, Rosenberg, Endom & Riess’s Suggested Criteria for Selection of Pls.’ Class Counsel, Dec. 11, 2000. The other law firm seeking disqualification, Krislov & Associates, wanted to be appointed to a steering committee to manage this litigation. Whether or not that played a role in the bringing of the motion does not affect my analysis. A court has an independent obligation to assess conflicts of interest. See Kevlik, 724 F.3d at 846 (“district court has duty and responsibility of supervising the conduct of attorneys who appear before it.”).

without that client's informed written consent if such new representation is substantially related to the subject matter of the former representation or may involve the use of confidential information obtained through such former representation." Id. 3.4(d)(1)(i). Here, Milberg Weiss assumes for purposes of the motion that its current representation is substantially related to the subject matter of its former representation, Mem. in Opp'n to Mot. to Disqualify Counsel at 6 n.4, and I shall do the same. Milberg Weiss has not provided the court with any written consent from its former clients. Thus, the question remains the same: is the new representation "adverse" to the former clients?⁸

The Maine rules do not define what constitutes an adverse representation. The Advisory Committee Note to the July 1, 1993 Amendments, however, states that representation by an attorney is "adversely" affected "if the potentially conflicting duties create incentives or constraints that would limit the zeal or effectiveness with which the lawyer represents the client." ME. BAR RULE 3.4 Advisory Committee's Note to July 1, 1993 Amendment; see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121, cmt. c(i) (noting that adverse effect "relates to the quality of representation; the incentives faced by the lawyer after or during the representation"). Thus, the inquiry is focused on the *potential* for an

⁸ The parties have assumed that the "former client" analysis is the appropriate one. I observe that actually the four retailers could be considered "current clients" within the meaning of the rule, because they were still clients of Milberg Weiss at the time Milberg Weiss filed its consumer class actions. See, e.g., Blanchard v. Edgemark Fin. Corp., 175 F.R.D. 293, 306 n. 18 (N.D. Ill. 1997) (noting that withdrawing from existing representation will not transform a present-client conflict into a former-client conflict); Ransburg Corp. v. Champion Spark Plug Co., 648 F. Supp. 1040, 1044 (N.D. Ill. 1986) (noting that status of a present or former client should be determined at the time the complaint is filed); see also Unified Sewerage Agency v. Jelco Inc., 646 F.2d 1339, 1344 n.4 (9th Cir. 1981). But the result would not change. Informed written consent from all parties would be (continued next page)

adverse effect. ME. BAR RULES, Reporter's Notes (noting that conflict rules "eliminat[e] any requirement that the contemplated employment actually produce an adverse effect; [i]t is enough if it is likely to do so"); see also IBM v. Levin, 579 F.2d 271, 280 (3d Cir. 1978).⁹ I therefore examine the consequences for both the potential consumer class in this lawsuit and for Milberg Weiss's former retailer clients in permitting Milberg Weiss to continue as counsel here.¹⁰

Milberg Weiss asserts that there are no adverse effects for its four previous clients. Milberg Weiss does not plan to name any of its retailer clients as defendants; it does not expect any other plaintiff to name these retailers (a consolidated amended complaint has been filed and does *not* name them);¹¹ it does not expect to take any discovery from the retailers; and therefore, its expert says, the consumer class action will not have any adverse effects on the economic interests of the retailers. Simon Report at 8-9. In addition, Professor Simon notes that "Milberg Weiss has made it clear that it will not use [any confidential retailer] information in consumer actions," and that a partner at Milberg Weiss assured the retailer's lead counsel in the California action that "[w]e do not intend to use, for

required, see ME. BAR RULE 3(c)(2), and no such consent has been provided.

⁹ Milberg Weiss concedes that there is a potential conflict between the four individual retailers it represented and the consumer plaintiffs. In its Memorandum in Opposition to the Motion to Disqualify Counsel, Milberg Weiss stated that "[w]ith respect to those four former clients, there is a potential conflict. However, it is inconceivable that they would be defendants or that any discovery would be sought by the plaintiffs here from them." Mem. In Opp'n to Mot. To Disqualify Counsel at 9.

¹⁰ As I stated in my Order of January 26, 2001, denying the motion to disqualify Kohn, Swift & Graf, I do not treat Milberg Weiss as representing any retailers other than the four who were its clients.

¹¹ One of them, Third Street Jazz, ceased operating after the retailer action was filed. See Simon Report at 2. In addition, Digital Distribution filed for bankruptcy, but has remained in the retailer action by the bankruptcy trustee's authorization. See Simon Report at 2. But the other two (*continued next page*)

the new [consumer] cases, materials from the prior [retailer] cases which are (a) covered by protective order limiting their use to those cases, or (b) privileged or work product.” Id. at 8.

These measures may eliminate any adverse effect on Milberg Weiss’s prior retailer clients, but unfortunately they carry the distinct potential of reducing Milberg Weiss’s effectiveness in representing the putative consumer plaintiff class vigorously here. The prior representation has created an incentive for Milberg Weiss not to name those retailers as defendants or to seek any information from them that may be helpful in prosecuting the consumer case. And it has already agreed not to use certain information it acquired in the earlier case. Milberg Weiss characterizes its former retailer clients as “mom and pop operations,” thereby suggesting that there would be no reason to name them as defendants here. Given its interest, I cannot rely on the Milberg Weiss statement to make it so. Even if I treat the decision by other law firms not to name these four retailers as defendants in the Consolidated Amended Complaint as confirming the lack of any reason to name them as defendants, I cannot be confident that even “mom and pop operations” would have no useful information to discover or, indeed, that Milberg Weiss is not already in possession of such information that it has agreed not to use.

I conclude that the retailer and consumer representations are inescapably adverse.¹² Therefore, Milberg Weiss must be disqualified.

apparently are still ongoing businesses.

¹² Essentially, Milberg Weiss switched sides. It filed complaints in the consumer action
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CONCLUSION

The motion to disqualify Milberg Weiss is therefore **GRANTED**.

SO ORDERED.

DATED THIS 12TH DAY OF MARCH, 2001.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

against distributors and retailers just as it informed its co-counsel in the Third Street Jazz action that it no longer could represent the retailer. See supra notes 3, 8. “[F]or a lawyer to switch sides on the same or a related controversy would create an appearance of impropriety and serve to undermine the public's confidence in the integrity of the legal profession.” NFC, Inc. v. General Nutrition, Inc., 562 F. Supp. 332, 333 (D. Mass. 1983).